Office-Supreme Court, U.S.
FILED
MAR 28 1981
ALEXANDER L. STEVAS,
CLERK

Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Petitioner

-vs-

Howard Hughes, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT HUGHES OPPOSING THE PETITION FOR CERTIORARI

RICHARD L. AYNES

Appellate Review Office
School of Law
University of Akron
Akron, Ohio 44325
(216) 375-7751

Counsel for Respondent Hughes

TABLE OF CONTENTS

	Page
I. PRELIMINARY STATEMENT.....	1
II. STATEMENT OF THE CASE.....	3
III. ARGUMENT OPPOSING CERTIORARI.....	4
IV. CONCLUSION.....	24
V. CERTIFICATE OF SERVICE.....	28

TABLE OF AUTHORITIES

Cases

	Page
Barnes v. United States, 412 U.S. 837 (1973)	15
Bell v. Perini, 635 F. 2d 575 (6th Cir. 1980)	2
Carter v. Jago, 637 F. 2d 449 (6th Cir. 1980)	2, 12
Cole v. Stevenson, 620 F. 2d 1055 (4th Cir. 1980)	22
Hankerson v. North Carolina, 432 U.S. 233 (1977)	12, 25
Holloway v. McElroy, 632 F. 2d 605 (5th Cir. 1980)	26
State v. Abner, 55 Ohio St. 2d 251, 379 N.E. 2d 228 (1978)	19
State v. Chase, 55 Ohio St. 2d 233, 378 N.E. 2d 1069 (1978)	19

State v. Humphries, 51 Ohio St. 2d 121 364 N.E. 2d 369 (1977) 17

State v. Robinson, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) 16

State v. Rogers, 43 Ohio St. 2d 28, 330 N.E. 2d 674 (1975) *cert. den.* 423 U.S. 1061 (1976) 17

State v. Silvus, 22 Ohio St. 90 (1871) 15

Wainwright v. Sykes, 433 U.S. 72 (1977) 9, 10, 21, 25 26

Other authroity

Lehman & Norris, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974). 16

Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Petitioner

-vs-

Howard Hughes, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT HUGHES OPPOSING THE PETITION FOR CERTIORARI

I.

Preliminary Statement

HOWARD HUGHES, by and through his undersigned counsel, filed this Brief in opposition in order to demonstrate that the instant case is an inappropriate one for the granting of Certiorari. Though Petitioners Engle and Perini exercised their option to file one

consolidated Petition for Certiorari from the three separate judgments below, each of the three Respondents have elected to file separate briefs opposing that Petition. Nevertheless, in an attempt to avoid redundancy and to further the interest of judicial economy, Respondent Hughes will attempt to limit his argument to those matters that may be of particular importance to his own case and, on questions of more general applicability, rely upon the legal analysis set forth in the Brief filed by Respondent Bell.

As a matter of convenience, it should be noted that since the filing of the Petition for Certiorari, two of the relevant cases cited by Petitioner have been officially reported: *Bell v. Perini*, 635 F. 2d 575 (6th Cir., 1980) and *Carter v. Jago*, 637 F. 2d 449 (6th Cir., 1980).

II.

Statement of the Case

Respondent Hughes accepts, for the limited purposes of these Certiorari proceedings, the Statement of the Case entitled *"Hughes"* that appears on pages five through six of the Certiorari Petition. At the same time, to the extent that Petitioner's representations with respect to both Ohio law and the decision of the Sixth Circuit which appear under the heading *"Isaac"* (Certiorari Petition at 3 through 4) are relevant to the instant case, Mr. Hughes specifically contests what he believes to be a misapprehension with respect to both the status of the law in the state of Ohio and the decision of the *en banc* panel of the United States Court of Appeals for the Sixth Circuit rendered in *Isaac* on December 12, 1980. To the extent that the interpretations of these legal questions may be relevant, Mr. Hughes joins in and concurs fully with the analysis of

Ohio law and the analysis of the opinion of the Sixth Circuit set forth fully in the Brief in Opposition submitted to this Court by Respondent Bell.

III.

Argument Opposing Certiorari

A.

THE FACT THAT MR. HUGHES HAS RECEIVED A FINAL RELEASE FROM THE STATE OF OHIO DEMONSTRATES THAT THIS IS NOT A PROPER CASE FOR CERTIORARI.

Petitioner Engle points out in page 6 of his Petition for Certiorari that Mr. Hughes, like Mr. Isaac, has received a final release (termination) of his parole from the state of Ohio. This means, that as far as the state of Ohio is concerned, he has fully served his entire sentence.

This fact calls into question the propriety of allowing Superintendent Engle to continue to pursue this litigation. To be sure, there are collateral consequences that

attach to a felony conviction and Mr. Hughes has a vital interest in seeking to maintain intact the favorable decision that he received from the United States Court of Appeals below.

But what is the interest of Respondent Engle in this proceeding? Counsel for Petitioner Engle has proffered as an interest "the collateral consequences of reversed conviction" (Petition at 6). However, it is important to note who the parties actually are in this proceeding. Unlike a criminal case which may come to this Court directly from the State Supreme Court, the state of Ohio is not named as a party. Rather, Mr. Engle was named as the party defendant here. He was named as such, not as a representative of the state of Ohio, but by virtue of the fact that he was the individual who held custody of Mr. Hughes when the Habeas Corpus Petition was filed. The reason for naming him as a party and his sole interest in this proceeding stems from his status as custodian.

Normally if he, as custodian, prevails, then he is allowed to continue to maintain custody of the prisoner. If he loses in the Habeas proceedings, then he is compelled to release the prisoner. If a prisoner gains release after a favorable decision on appeal and this Court should reverse the decision of the appellate court, then the custodian would have the right to reassert custody over the individual. In the case at bar Mr. Engle admits that he has no claim of custody over Mr. Hughes. If Mr. Engle prevails, Mr. Hughes still remains free with a final release. If Mr. Hughes prevails, obviously the same result attaches. Thus, if this Court were to grant Certiorari, no matter what the outcome, there would be no "remedy" which would in any way change Mr. Engle's position. While the collateral consequences of a conviction or lack of conviction would certainly affect Mr. Hughes and would arguably affect the interest

of the state of Ohio, it has no effect upon Mr. Engle's standing as the Superintendent to claim the right to maintain custody.

Counsel for the Petitioner seems to admit as much when he refers to Mr. Bell's case, who is still in custody, as a "live" case and, at least by implication, acknowledges that neither Mr. Isaac's nor Mr. Hughes' case presents a "live" case (Petition at 6). Under these circumstances, Mr. Hughes would submit that Superintendent Engle's interest in this case is, at best, only an abstract concern with the academic question in which he has no greater interest than any other citizen in the state of Ohio. It is therefore submitted that the case is not one appropriate for the granting of Certiorari.

B.

ISSUES CONSIDERED BY THE COURT OF APPEALS BELOW.

In attempting to persuade this Court that the decision below raises issues which

are deserving of the attention of this Court Petitioner Engle emphasizes that the majority of the panel below consisted of a combination of a plurality and two separate concurring opinions, while there were also four dissenters. Further, Petitioner quotes from the separate concurring opinion of Chief Judge Edwards to the effect that the *Isaac* opinion caused much "soul-searching thought and debate." (Petition at 7.)

But in assessing the significance of these facts, it is important to place them in their proper context by considering the issues that were before the U. S. Court of Appeals in *Isaac*. A careful reading of the *en banc* decision in *Isaac* makes it clear that the Court in that case had to resolve three separate issues:

1. Was it error to place the burden of proof upon the issue of self defense on the accused?

2. If so, was that error of constitutional magnitude?

3. If so, was the Petitioner precluded from asserting the constitutional violation in Habeas Corpus because of the waiver concept enunciated in *Wainwright v. Sykes*?

As best as counsel for Mr. Hughes can determine, no member of the Court below denied that the state had erred in making Mr. Isaac (and Mr. Hughes) prove their innocence by establishing that they had acted in self-defense. Thus, upon the first issue the Court appears to have been unanimous.

With respect to the second question, every Judge in the plurality, plus the two concurring Judges, plus Judge Merritt, who dissented, agreed that the error rendered the trial below constitutionally infirm. The dissenting Judges who took the opposite approach did so upon the novel theory that under state law neither the state nor the accused bore any burden of proof upon the issue of self-defense.

(In effect, such a holding would mean that self-defense was irrelevant to any homicide.) But upon the question of whether there was constitutional significance to the jury instruction error, the split of the Court below may be properly characterized as 7 to 3.

On the third question, the *en banc* panel was split 6 to 4, with a clear majority holding that there was no waiver under the standards articulated by *Wainwright v. Sykes, supra*. But in examining the cause of the "soul-searching thought and debate" that Chief Judge Edwards refers to, it is evident that this cause was not the waiver issue, but rather the question of whether the state of Ohio could have elected to enact a different statute than the one in force here and, by that new statute, constitutionally require the accused to bear the burden of proof upon the issue of self-defense.

This issue was injected by the plurality opinion's proffered view that even though

in this case, the state of Ohio had chosen not to place the burden of proof upon the accused, it was free to do so. It was this expression of opinion that prompted responses by Chief Judge Edwards, Judge Jones and Judge Merritt (dissenting on other grounds). Though that disagreement may have been intense, an examination of the record will demonstrate that both the plurality's view and the response by the other Judges was *dicta*. The broader question of whether the state of Ohio could constitutionally place the burden of proof upon the accused was neither raised nor briefed by any of the parties or *amici* in the Court of Appeals below. (This issue was briefed in both the present case and in Mr. Bell's case.)

Mr. Hughes does not deny that the constitutional issue of whether the state may constitutionally require him to prove his innocence by proving that he acted in lawful

self defense is an important one which was reserved in *Hankerson v. North Carolina*, 432 U.S. 233 (1977). However, given the fact that the discussion of this issue in the *Isaac* case was *dicta;* that such expression was obtained without the normal adversary process of briefing and arguing the issue; and that *Isaac* presents a narrower grounds for deciding the instant case, Mr. Hughes respectfully submits that the present case is not the most appropriate one for resolving that weighty issue. Indeed, once final decision is rendered it would appear that the case relied upon by the Petitioner, *Carter v. Jago*, 637 F. 2d 449 (6th Cir., 1980) (Petition for rehearing pending) would be a proper vehicle for the resolution of that question.

The point to be made here is that, contrary to the view presented by Petitioner Engle, the Court below was not "fragmented" upon the important issues of the case. Rather,

the voting upon each of the issues demonstrates unanimity upon the first question presented, a seven to three split upon the second, and a six to four split upon the third. Further, it was not the "waiver" issue upon which the Petitioner seeks Certiorari which caused so much disagreement in the Court below, but rather the wider constitutional issue with respect to the constitutionality of requiring the accused to prove his innocence by proving self-defense. While that issue is an important one deserving the granting of Certiorari, it is not the basis for the Petition in this case and, as set forth above, this case would not be the best vehicle for presenting that question.

C.

THE CONFUSION CREATED BY THE STATE OF OHIO THROUGH ITS LEGISLATURE IN COURTS MAKES THIS CASE ONE INAPPROPRIATE FOR CERTIORARI.

On page 7 of his Certiorari Petition, Mr. Engle refers to the issues in the case at bar as being, *inter alia*, "novel" and "complex." Respondent Hughes agrees with both of those characterizations and would suggest that they are reasons why this Court should not grant Certiorari.

This history of the burden of proof on the issue of self defense in the State of Ohio, the legislature's statutory change in that burden, and the Ohio Supreme Court's inconsistent responses to that change are perhaps unique in the history of the nation. It certainly comes within the label "novel" since neither party has presented to this Court any example where a similar situation has arisen. Mr. Hughes believes that an examination of this history will demonstrate that it is the state of Ohio which, by its own inconsistent actions, has created complexity which counsels against the granting of certiorari. That history may be summarized

as follows.

Prior to 1974 case law interpretation placed the burden of proof on self-defense upon the accused. This action was not based upon the view that self-defense bore no relationship to guilt or innocence. To the contrary, Ohio case law specifically recognized that proof of self-defense was proof of innocence. But the placement of the burden of proof on this issue upon the accused was justified by use of a presumption: that all killings were presumed to be unlawful and that proof of self-defense negated that presumption. *E.g., State v. Silvus*, 22 Ohio St. 90 (1871). Reliance upon such a presumption today would be misplaced, since subsequent developments in this Court have indicated that presumptions of this nature are unconstitutional. *E.g., Barnes v. United States*, 412 U.S. 837 (1973).

In 1974 the Ohio Legislature enacted a comprehensive revision of the Criminal Code.

This included a provision which indicated that on affirmative defenses, the accused had only the burden of going forward and that the state had the burden of proof. In spite of this major change, no mention was made of the change in the comments to the new code, nor in the law review article on the legislative history of the revision which was authored by two of the co-sponsors of the bill, one of which was a lawyer and Chairperson of the House Judiciary Committee. Lehman & Norris, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974).

In its first look at the new statute, the Ohio Supreme Court stated directly that with respect to affirmative defenses the statute required the accused "to prove that issue by a preponderance of the evidence." *State v. Rogers*, 43 Ohio St. 2d 28, 33, 330 N.E. 2d 674 (1975) *cert. den.* 423 U.S. 1061 (1976). But one year later

the same Court, in *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) correctly interpreted the statute to have changed the common law in Ohio on the burden of proof with respect to affirmative defenses. In so holding the majority failed to acknowledge its prior decision in *Rogers* even though that decision was cited by the sole dissenting Judge. *Robinson*, 47 Ohio St. 2d at 118. Moreover, the Court indicated that since the terms used in the statute had a "well-recognized meaning", there could be "no substantial doubt" as to its interpretation, which, in the view of the Court, was "obvious." *Robinson*, 47 Ohio St. 2d at 110.

The following year the State Supreme Court rendered its opinion in *State v. Humphries*, 51 Ohio St. 2d 121, 364 N.E. 2d 369 (1977). That decision, by invoking the contemporaneous objection rule to limit the application of *Robinson* to cases in which the accused's counsel had actually entered an

objection to the improper jury instruction, set a higher standard of legal scholarship for the practicing bar than the Ohio Supreme Court exercised when acting in its own official capacity. In effect, the Court faulted trial counsel and made clients suffer for that fault, when trial counsel did nothing more than make the very same mistake that Court had made in *Rogers*.

Finally, in subsequent decisions the the Ohio Supreme Court admitted, as it must, that self-defense was relevant to guilt or innocence in that it might raise a reasonable doubt as to the guilt of the accused. The logical corollary is that where self-defense has been properly placed in issue guilt can be established only where the state has proved, beyond a reasonable doubt, that the accused did not act in self-defense. Yet, the Ohio Supreme Court held that it was not error to fail to instruct the jury that the state must establish that the accused did not

act in self-defense. *State v. Abner*, 55 Ohio St. 2d 251, 379 N.E. 2d 228 (1978) and *State v. Chase*, 55 Ohio St. 2d 237, 378 N.E. 2d 1064 (1978). In effect, the State Court held that though self-defense is relevant to guilt or innocence, the jury should not be told how the evidence on self-defense may relate to its judgment upon guilt or innocence.

An examination of these conflicting actions and decisions is required to determine both the constitutional significance of the error in the trial below and whether counsel's failure to object comes within the cause and prejudice standards. Indeed, ultimately one might well conclude that in order to pass judgment upon this case, this Honorable Court would be required to question either the competence, the good faith, or perhaps both, of the State of Ohio. It was for reasons such as this that Chief Judge Edwards was apparently prompted to write:

> "A full understanding of this record has convinced me that this case is not a satisfactory medium for decision of the difficulties inherent in the collision between Ohio's tangled laws pertaining to self-defense and the federal due process standards . . ." (Slip Op. at 12; Petitioners Appendix at A-11.) (Emphasis added.)

Mr. Hughes respectfully submits that these considerations are equally as true on Certiorari. This type of complexity, which arises not from the course of normal legal proceedings, but rather from the inconsistency of the action of official bodies of the state of Ohio, renders this case particularly unsuited for review by the highest Court in the land.

D.

EXTREMELY LIMITED PRECEDENTIAL EFFECT OF THE DECISION BELOW AND, CONSEQUENTLY OF ANY DECISION RENDERED BY THIS COURT UPON THESE CASES, MAKES IT AN INAPPROPRIATE VEHICLE TO FURTHER DEFINE THE CAUSE AND PREJUDICE STANDARD ADVANCED IN *WAINWRIGHT*.

Petitioner Engle attempts to frame his issue in terms of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and argues that the decision of the Sixth Circuit below is in conflict with *Cole v. Stevenson*, 620 F. 2d 1055 (4th Cir. 1980). But an examination of the *Cole* case indicates that that case is distinguishable from the case at bar in a number of instances. The two most noteworthy factors are: (1) the benefits under *Hankerson* that were claimed in *Cole* derived directly from this Court's prior pronouncements on the constitutional requirement of proving guilt beyond a reasonable doubt and was not tainted by any inconsistent or contradictory actions as the State of Ohio, through its legislature and courts, injected in the case at bar; and (2) to the extent that it can be argued that there was any "confusion" as the meaning of the federal constitutional standard, the state in *Cole* might be able to claim that it was not responsible for that misunderstanding;

but in the case at bar, it was the State itself which caused the confusion and no claim can be made that it relied upon the decisions or interpretations of the federal courts in finding the meaning of its state statute.

More importantly, any decision must be considered within the context of its own facts. The broader and more familiar the factual pattern, the greater the principles of law that can be articulated and the more important is the case for purposes of determining whether Certiorari is warranted. By the same token, the more unique -- in this case bizarre would perhaps be a more appropriate term -- the factual and legal basis of the case, the less precedential value it will have.

In this context, it is important to emphsize the limited application of the *Isaac, Bell & Hughes* decisions, even in *Wainwright* situations:

First. This decision, because it is based upon the unique circumstances of Ohio law, has no general precedential value in any other jurisdiction, including the other States within the Sixth Circuit.

Second. Even as to Ohio, the case only applies to criminal cases and then only to those cases which were tried between January 1, 1974 and November 1, 1978.

Third. Even as to that narrow category of cases, the decision would not affect all criminal cases, but only those in which an affirmative defense was raised. But the holding is even more limited since it would not affect:

(a) Those cases where the accused was acquitted in spite of having to bear the burden of proof;

(b) Those cases in which the State courts have ruled that it was error to give any instruction of the affirmative defense

and hence any error in such instruction was harmless beyond a reasonable doubt; and

(c) Those who have received a final release from the State of Ohio and filed no habeas petition cannot now do so because of the "in custody" requirement.

Fourth. As set forth in Mr. Bell's Brief in Opposition, several of the similar twenty-five cases which Petitioner Engle estimates are still pending are not, in Petitioner's words, "live" cases.

Because of the limited precedential nature of the decision below Mr. Hughes submits that the case does not justify the expenditure of time and resources by this Court on a matter that has already received *en banc* consideration by the Circuit Court.

IV.

CONCLUSION

Respondent Hughes does not in any way

deny that the outcome of this case is extremely important to him. Nor does he deny that counsel for the Petitioner may have an "intense" academic interest in attempting to have this case resolved in his client's favor. However, neither of these factors are justification for the granting of Certiorari. Mr. Hughes has attempted to demonstrate to the Court that because of a variety of circumstances, most of which were caused by the State of Ohio, this case is not one which should be used as a vehicle to expound upon important principles of constitutional law.

Indeed, with respect to the *Wainwright v. Sykes* issue, the Court has already spoken and given general guidance to the lower courts upon the proper application of these principles. It is on the broader self-defense issue that this Court specifically reserved judgment in *Hankerson v. North Carolina, supra,*

which is deserving of the attention of the Court. *See Holloway v. McElroy*, 632 F. 2d 605 (5th Cir., 1980). Given the choice between granting Certiorari in an area where this Court has already given guidance through its decision in *Wainwright v. Sykes* and a case which is recognized as causing a problem to the lower courts on an issue which is specifically reserved, *Hankerson v. North Carolina, supra*, it would appear that the latter would be much more deserving of the attention of this Court.

Of course, as previously indicated, while this issue was discussed in the principal opinion, *Isaac*, that decision does not rest upon that issue and the expression of opinion on that question was *dicta*. Consequently, it would seem inappropriate to attempt to utilize Mr. Hughes' case as a vehicle to dispose of that wider question.

For all the foregoing reasons, Mr. Hughes submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD L. AYNES

Appellate Review Office
School of Law
University of Akron
Akron, Ohio 44325
(216) 375-7751

Counsel for Respondent
Howard Hughes

CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Brief in Opposition were sent by first class mail to counsel for Petitioner, William J. Brown, Simon B. Karas, and R. David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, on this day of March, 1981. The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio, 45601.

RICHARD L. AYNES
Counsel for
Respondent Hughes